89-1281

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

HERNAN BOTERO MORENO,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER INFORMATION IN CURRENCY TRANSACTION REPORTS IS INTANGIBLE PROPERTY OF WHICH THE UNITED STATES GOVERNMENT CAN BE DEPRIVED UNDER THE MAIL FRAUD STATUTE, 18 U.S.C. § 1341.

II. WHETHER FAILURE TO FILE CURRENCY TRANSACTION REPORTS DEPRIVES THE UNITED STATES GOVERNMENT OF PROPERTY UNDER THE MAIL FRAUD STATUTE, 18 U.S.C. § 1341.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit.

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Hernan Botero Moreno, the Petitioner herein, prays the Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit in *United States of America v. Hernan Botero-Moreno*, Case No. 88-5953, dated November 15, 1989 is unpublished. The Court of Appeals affirmed, per curiam and without opinion, the judgment of the United States District Court for the Southern District of Florida in *Hernan Botero-Moreno v. Bill R. Story, Superintendent, FCI, Ashland, Kentucky*, denying relief under 28 U.S.C. § 2255. No request for rehearing was made to the Court of Appeals for the Eleventh Circuit.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered November 15, 1989.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

18 U.S.C. § 1341
31 C.F.R. § 103.21
31 C.F.R. § 103.22(a)(1)

STATEMENT OF THE CASE

This petition requests that the Court review a decision of the United States Court of Appeals for the Eleventh Circuit, which adopted the novel theory that information in Currency Transaction Reports ("CTRs") is U.S. Government property and, further, that the failure to file CTRs deprives the U.S. Government of property in violation of the federal mail fraud statute. *(See* Appendix at A-1 and A-2 through A-5.)

Hernan Botero Moreno ("Botero"), the Petitioner, arranged with three bank officers at the Landmark First National Bank of Broward County, Florida ("Landmark Bank"), for use of their bank on behalf of a currency exchange house, Inversiones Peinado Navarro ("IPN"). The Landmark Bank's principal service would be to accept deposit of large amounts of U.S. currency to be transferred to the foreign reserves of Colombia in the United States with credits in pesos created and distributed in Colombia. No discussion of CTRs occurred when Botero met with the officers to establish the arrangement.[1] Deposits took place over a ten-month period. The bank officers, who were guilty of major unrelated felonies, circumvented the CTR filing requirement by completing the CTR form, retaining the

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1/ A Currency Transaction Report (Treasury Form 4789) must be filed by financial institutions with the Internal Revenue Service pursuant to 31 C.F.R. § 103.22(a)(1), which implements Section 222 of the Bank Secrecy Act of 1970, 31 U.S.C. § 5313(a). The regulation requires that a CTR be filed for each deposit which involves a transaction in domestic currency of more than $10,000. Form 4789 requires such items as the name, address, business or profession and social security number of the person conducting the transaction, and similar information as to the person or organization for whom it was conducted.

bank's copy, and destroying the original rather than sending it to the Internal Revenue Service, as required by the law. On February 19, 1981, an indictment was brought charging Botero and five co-defendants with eighteen criminal counts.[2]

A central issue at trial was whether Botero was responsible for the bank officers' actions in not filing CTRs. The Government's theory of the case was that Botero, in effect, directed and paid the bank officers for not filing CTRs. On the basis of the bank officers' allegations, the prosecution was permitted to state that the monies deposited at the Landmark Bank represented proceeds from the illegal sale of drugs. Botero insisted that the bank officers were solely responsible for the failure to file CTRs and that his role was limited to assisting IPN in conducting the currency exchange business, because its owner, Augusto Peinado Navarro, did not speak English. Peinado Navarro was neither named as a co-conspirator nor indicted.

In 1984, the United States Government requested the extradition of Botero, a Colombian national, from Colombia. The Colombian Government allowed extradition for only the following charges, as it understood them:

-- Count I, Objective 2 only: conspiracy to falsify public and private documents.
-- Count II: falsification of public and private documents;
-- Counts III-VII: concealing the object or proceeds of a crime.

2/ The full text of this indictment is reproduced in the Appendix to this Petition at A-6 through A-33.

The Colombian Government did not consider the other charges in the indictment extraditable, because they did not constitute crimes under Colombian law. The extradition decree also denied extradition for Count I, Objective 3, conspiracy to commit mail fraud, because mail fraud as defined by U.S. law is not a criminal offense in Colombia. Nevertheless, after equating mail fraud under U.S. law to the Colombian offense of concealing the proceeds of criminal activity, the Government of Colombia granted Botero's extradition for Counts III-VII, the substantive mail fraud charges.

The U.S. Government's request for Botero's extradition was supported by the affidavit of an Assistant United States Attorney asserting that Botero was charged with defrauding the United States "by obstructing the lawful government functions of the United States for collection of reports of currency transactions in excess of $10,000. ... His actions ... prevented the United States from being made aware of cash transactions and thereby did mislead the Federal Government." Even though Count XVIII, a cocaine importation charge, had been dismissed over a year previously, the extradition request also included a copy of the full indictment, including Count XVIII.

Another Assistant U.S. Attorney articulated the Government's theory of mail fraud in this case in her opening statement to the jury which convicted Botero:

> You don't only defraud the government if you take away its money, you defraud the government by corrupting its function to provide you, to provide citizens with an honest, efficient government. ... And the defrauding in this case was the concealing of the fact that money was

> being brought to the Landmark Bank. (Emphasis added.)

On June 18, 1985, the jury returned guilty verdicts on all seven counts, including the five counts of mail fraud. The Pre-Sentence Investigation Report stated:

> The only identifiable victim in this case is the United States Government. However, there are no specific monetary losses associated with the offense and restitution would not seem to be an issue here. (Emphasis added.)

Botero was sentenced to 5 years in prison for each count of mail fraud. The United States Court of Appeals for the Eleventh Circuit affirmed his conviction. Botero petitioned for certiorari to the United States Supreme Court, but this was denied on June 26, 1987.

On October 7, 1987, Botero filed a Motion for Relief under 28 U.S.C. § 2255 with the United States District Court for the Southern District of Florida arguing that the United States Supreme Court's decision in *McNally v. United States,* 483 U.S. 350 (1987), required that his convictions under Counts III-VII, the mail fraud counts, be vacated because, *inter alia,* he was neither indicted nor proven guilty of depriving the U.S. Government of money or property. On September 16, 1988, the District Court handed down a Memorandum Opinion Order denying Botero's motion under 28 U.S.C. § 2255. The District Court held that the information contained in CTRs was intangible property belonging to the U.S. Government and that the five mail fraud counts alleging that Botero deprived the IRS of CTR information were legally sufficient to sustain conviction

despite the ruling in *McNally,* that mail fraud requires a deprivation of another's money or property. On November 15, 1989, the United States Court of Appeals for the Eleventh Circuit affirmed, per curiam and without opinion, the judgment of the District Court. It is for a review of the judgment of the Court of Appeals that Botero now respectfully petitions the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THIS COURT AND THREE OTHER CIRCUITS BY HOLDING THAT INFORMATION IN CURRENCY TRANSACTION REPORTS IS INTANGIBLE PROPERTY BELONGING TO THE UNITED STATES GOVERNMENT

A. The Decisions of this Court Indicate that Information in Currency Transaction Reports Is Not Intangible Property Belonging to the United States Government

In its Opinion of September 19, 1988, the U.S. District Court for the Southern District of Florida arrived at the following incorrect legal conclusion:

> In this case, there was intabible (sic) property at stake -- the information which the Internal Revenue Service was deprived of (i.e., information contained within the CTR form and

> collected for 'use of (sic) criminal, tax and regulatory investigations and proceedings'). This is consistent with the reasoning used in *Carpenter.*

(*See* Appendix at A-4 through A-5.) The District Court reasoned that depriving the Internal Revenue Service of such information, as alleged in the mail fraud counts of Botero's indictment, satisfied the statutory requirements for mail fraud set forth in *McNally v. United States,* 483 U.S. 350 (1987). Moreover, the District Court disregarded arguments submitted by Botero subsequent to *Carpenter v. United States,* 484 U.S. 19 (1987), which proved that *Carpenter* was not authority for deciding that mere information in Government forms was intangible U.S. Government property. The subsequent per curiam affirmance without opinion by the United States Court of Appeals for the Eleventh Circuit is tantamount to a determination that the District Court's judgment was entered without error of law. *See* 11th Cir. Rule 36-l(e). (*See* Appendix at A-35.)

1. The Eleventh Circuit is in Conflict with *McNally v. United States*

In *McNally v. United States,* this Court limited the scope of the federal mail fraud statute, 18 U.S.C. § 1341, to schemes designed to deprive the victim of property rights. *McNally,* 483 U.S. at 356. *McNally* also reaffirmed the well-established principle that if the acts alleged in an indictment do not constitute a violation of the law that the defendant has been charged with violating, any subsequent conviction based on that indictment must be reversed. *Id.* at 360 (*quoting Fasulo v. United States*, 272 U.S. 620 (1926)).

The decision of the Eleventh Circuit conflicts with *McNally,* because it upholds Botero's conviction on five

counts of mail fraud in the face of an indictment that did not charge him with depriving any person or institution of money or property rights.[3] Rather, the mail fraud counts in Botero's indictment charged him with depriving the Internal Revenue Service of knowledge and information about financial transactions.

This Court also held in *McNally* that intangible rights such as the right of the citizenry to good government fall outside the protection of the mail fraud statute. *Id.* at 356. In charging Botero with depriving the IRS of knowledge and information about the amounts and persons involved in transactions at the Landmark Bank, the putative mail fraud counts actually charged him with depriving the IRS of an intangible right which is not property -- the right to carry out its lawful Government regulatory function of collecting data in Currency Transaction Reports.[4] Consequently, the

3/ Except for the month in 1980 to which each applies, the text in Counts III-VII, the mail fraud counts, is identical. *See* Appendix to this Petition at A-15 through A-22.

4/ Count I, Object 1, of the indictment against Botero charged him with conspiracy, in violation of 18 U.S.C. § 371 to:

> ... defraud the United States, in particular the Internal Revenue Service, by impairing, obstructing, and defeating its lawful government functions of the collection of data and reports of currency transactions in excess of $10,000 for use in criminal, tax, or regulatory investigations or proceedings....

It is possible that in drafting Count I, Object 1, and Counts III-VII of the indictment, the Government failed to distinguish between the meaning of the term 'defraud' in 18 U.S.C. § 371, the conspiracy statute, and the meaning of the same term in 18 U.S.C. § 1341, the mail fraud statute. As explained in *McNally,* 483 U.S. at 358-359, n. 8, 18 U.S.C. § 371 continues to reach conspiracies to impair, obstruct, or defeat the lawful functions of Government. After *McNally,* however, such a broad construction is not applicable to the mail fraud statute. By framing the mail fraud counts against Botero in the broad terms of § 371, the indictment was legally deficient.

decision of the Eleventh Circuit is in conflict with *McNally,* because it upholds Botero's conviction on five counts of mail fraud despite an indictment that charged him with depriving the U.S. Government of intangible rights which are not property rights.

2. The Eleventh Circuit is in Conflict with *California Bankers Association v. Shultz*

In *California Bankers Association v. Shultz,* 416 U.S. 21 (1974), this Court held, *inter alia,* that the regulations under the Bank Secrecy Act of 1970 for the reporting by financial institutions of domestic financial transactions are reasonable and abridge no Fourth Amendment rights of such institutions. In reaching this result, the Court also explained the purposes behind requiring institutions to file Currency Transaction Reports with the Internal Revenue Service for each transaction of more than $10,000 in U.S. currency. *See* 31 U.S.C. § 5313(a); 31 C.F.R. § 103.21. The explanation sets forth this Court's understanding of the nature and characteristics of a CTR and the information required to be included therein.

The Bank Secrecy Act provides for reports of domestic transactions where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. *California Bankers Association v. Shultz,* 416 U.S. at 37. *See also* 31 C.F.R. § 103.21. The latter language is repeated in Botero's indictment. Regarding the legislative intent of the Act, this Court wrote:

> In passing the Act, Congress recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanisms of the United States, had markedly increased. H.R. Rep. No. 91-975, *supra* at 10; S. Rep. No. 91-1139, *supra* at 2-3. Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for such reports. H.R. Rep. No. 91-975, *supra*, at 11-12.

California Bankers Association v. Shultz, 416 U.S. at 37-38. In a footnote, the Court described the type of information that financial institutions must include in a CTR. Essentially, this information encompasses the name, address, business or profession, and social security number of the person conducting the transaction; similar information as to the person or organization for whom it was conducted; and a description of the nature and amount of the transaction. *Id.* at 39, n. 15.

Pursuant to 31 U.S.C. § 5319 and 31 C.F.R. § 103.43, moreover, the Secretary of the Treasury, in some instances and in confidence, may make available to other departments or agencies of the United States information reported in a CTR. *California Bankers Association v. Shultz*, 416 U.S. at 40. The confidentiality interest to which the Court refers is that of the person carrying out a financial transaction, and not that of the United States Government. Otherwise, there would be no reason for restricting the ability of the Internal Revenue Service to disseminate the information to other agencies or branches of the U.S. Government.

In short, the information reported to the IRS in CTRs serves primarily as a means by which the U.S. Government keeps abreast of large currency movements, thereby facilitating enforcement of other laws. *See Id.* at 76-77. CTRs and the information included in them have a regulatory purpose. *Id.* at 37. Nowhere in the discussion by this Court is there any basis for an inference that the information itself constitutes property belonging to the United States.

The Court of Appeals decision in Botero's case affirmed the District Court's holding that CTR information is intangible property of which the U.S. Government could be deprived for purposes of the mail fraud statute. The regulatory purpose of this information, described in *California Bankers Association,* does not convert CTR information into U.S. Government property. Nor does the type of information, consisting principally of names, addresses, and other identifying data, establish any indicia of ownership. The Court of Appeals' conclusion would result in the information included in billions of routine U.S. Government forms and questionnaires taking on the status of Government property -- an absurd result, and one contrary to the teaching of this Court in *California Bankers Association.* The Eleventh Circuit has, thus, illogically expanded the reach of the mail fraud statue to millions of citizens who might be required to fill out Government forms. Moreover, the Bank Secrecy Act's restrictions on dissemination by the IRS of CTR information militates against the idea that such information is property of the U.S. Government.

For all the reasons discussed above, therefore, the decision by the Eleventh Circuit that CTR information is intangible property of the U.S. Government is in conflict with the decision of this Court in *California Bankers Association v. Shultz, supra.*

3. The Eleventh Circuit is in Conflict with *Carpenter v. United States*

The District Court opinion affirmed by the Eleventh Circuit decision purported to rely on this Court's holding in *Carpenter v. United States*, 484 U.S. 19 (1987), that *McNally* did not limit the scope of the mail fraud statute to tangible as distinguished from intangible property rights. The reliance on *Carpenter* was misplaced. *Carpenter* held that a newspaper's interest in confidential business information was an intangible property interest, protected by the mail fraud statute. *Carpenter,* 484 U.S. at 25. Unauthorized use of the confidential business information deprived the newspaper of the right to its exclusive use, exclusivity being an important element of private property. *Id.* at 26-27.

By affirming the District Court, the Eleventh Circuit derived from *Carpenter* the erroneous conclusion that any information in U.S. Government forms is intangible property protected by the mail fraud statute. The confidential business information discussed in *Carpenter* is distinguishable from the CTR information involved in Botero's case. First, there exists no authority for the proposition that the U.S. Government has a property interest in the confidentiality of information included in CTRs. If anything, as suggested by the restrictions on intra-governmental dissemination of this information, the confidentiality interest belongs to the person carrying out a transaction or the institution responsible for reporting the information. Second, the U.S.

Government expends no skill, labor, or money to collect CTR information. *See Id* at 26. Third, the U.S. Government has no right to exclusive use of CTR information such as names and addresses. Nor is there any notice on the form that the information is U.S. Government property. CTR information, in other words, exhibits none of the features of intangible property discussed in *Carpenter*. Nor does it exhibit the traditional hallmarks of literary or intellectual property such as novelty, originality, and notice of its proprietary nature.[5] Therefore, the decision of the United States Court of Appeals for the Eleventh Circuit affirming the opinion that information included in CTRs is intangible property belonging to the U.S. Government is in conflict with the decision of this Court in *Carpenter v. United States.*

B. The Decisions of the Second, Fifth, and Sixth Circuits Indicate that Information in Currency Transaction Reports Is Not Intangible Property Belonging to the United States Government

1. The Eleventh Circuit Is In Conflict with the Second Circuit

In *United States v. Grossman,* 843 F.2d 78 (2nd Cir. 1988), the United States Court of Appeals for the Second

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5/ In literary property, for example, "the property is not in the printed matter or the page on which the production is embodied, nor is it in the means of communication to others. It is rather in the expression that property inheres." P. Wittenberg, *The Protection of Literary Property*, 39 (1968). The U.S. Government does not fill out CTRs. A CTR, therefore, cannot be literary property belonging to the U.S. Government.

Circuit held that a law firm had a property interest in confidential information about a corporate recapitalization and that the mail fraud statute protected that property interest. The Second Circuit upheld the mail fraud conviction of an associate in the law firm who made use of the confidential information to profit from buying and selling stock in the company. In so ruling, the Second Circuit relied on *Carpenter,* in a way that contradicts the Eleventh Circuit's decision in Botero's case.

Just as the confidentiality of the information in *Carpenter* was of commercial value to the newspaper involved, the confidentiality of the information about a company's recapitalization in *Grossman* was of similar commercial worth to the law firm which was deprived of that information. *Grossman,* 843 F.2d at 86. The commercial value, as identified by the Second Circuit, lay not in the possibility that the law firm might exploit the information by trading on it, for it was barred by the securities laws from doing so, but, rather, in the reputation for professional and ethical conduct necessary for a law firm to serve clients and attract business. *Id.*

Unlike the Eleventh Circuit in Botero's case, the Second Circuit in *Grossman* set forth clearly the reasons why the victim of mail fraud, the law firm, had a property interest in the information of which it was deprived. The Eleventh Circuit offered no analysis showing that the U.S. Government was deprived of a property interest. Instead, it stretched *Carpenter* beyond recognition by concluding that CTR information is intangible property belonging to the U.S. Government simply because this Court held in *Carpenter* that stock market data destined for commercial publication may, under certain circumstances, be property that is protected by the mail fraud statute. The Second Circuit in *Grossman*

makes clear that it is necessary to analyze the characteristics that make information property under a specific set of facts. The Eleventh Circuit, therefore, is in conflict with the Second.

The Second Circuit's more recent decision in *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 53 (1989), confirms the conflict with the Eleventh Circuit. In *Porcelli*, the Court of Appeals upheld the mail fraud conviction of a defendant who falsified New York state sales tax returns, thereby failing to remit approximately $4,755,000 in state sales tax. *Id.* at 1356. The indictment charged the defendant with a scheme "to defraud the state of New York ... of sales taxes due on the retail sale of gasoline by underreporting the gross sales, taxable sales, and sales tax due."[6] *Id.* at 1361, n. 2. The crucial analytical step by the *Porcelli* court, lacking in the Eleventh Circuit's decision in Botero's case, is the determination that under New York law, the state's interest in the unpaid sales taxes referred to in the indictment is a chose in action. *Id.* at 1360. A chose in action is a property interest. *Id.* Just as in *United States v. Grossman*, the Second Circuit set forth in *Porcelli* the reasons why the fraud victim was deprived of a property interest protected by the mail fraud law. The Eleventh

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6/ The mail fraud counts in Botero's indictment include no comparable allegation that Botero, by failing to file CTRs, deprived or defrauded the U.S. Government of taxes due. Botero is alleged only to have deprived the IRS of the information contained in CTRs. During the appeal of the denial of relief under 28 U.S.C. § 2255, the Government first introduced the notion that the Indictment was directed at avoidance of income tax. Neither the text of the mail fraud counts nor the proceedings at trial support that representation. No attempt was made to make out a tax case against Botero.

Circuit's failure to offer such an analysis produced a decision in conflict with the Second Circuit.

2. The Eleventh Circuit Is In Conflict With The Fifth Circuit

The decision of the United States Court of Appeals for the Fifth Circuit in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), points out still another conflict with the decision of the Eleventh Circuit.

The *McClain* Court reversed convictions based on an alleged violation of the National Stolen Property Act, which prohibits transportation in interstate or foreign commerce of goods with the knowledge that such goods are stolen. The case involved pre-Columbian artifacts exported from Mexico without permission of the Mexican Government. The Fifth Circuit found that it was not clear that the defendants knew that the artifacts exported were the property of the Republic of Mexico. *Id.* at 992.

The *McClain* Court then distinguished between different types of governmental control over, and regulation of property within the borders of a state:

> All property is presumably within a state's police power: a state may prohibit the sale of firearms to convicted felons; it may regulate the price charged for electric power; it may prohibit the use of a privately owned manufacturing plant in a racially discriminatory manner; it may require some private parties to sell their railroads to other private parties. But the state's power to regulate is not ownership. Nor does the fact that

> a state has regulated an object in and of itself constitute ownership. (Emphasis added.)

Id. at 1002. This Court has characterized CTRs as a means by which the federal Government satisfies the regulatory goal of tracking currency movements in order to detect criminal activity. *See California Bankers Association v. Shultz, supra.* No statute, regulation, or ruling has ever mentioned a theory that CTR information is thereby U.S. Government property. The Eleventh Circuit's decision that CTR information is U.S. Government property is in conflict with the Fifth Circuit's pronouncement in *McClain* that the Government's power to regulate activity does not include title to, or ownership of the items associated with the regulation. *Id.* at 1002.

3. The Eleventh Circuit Is In Conflict With The Sixth Circuit

Finally, the Eleventh Circuit's decision is also in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Murphy,* 836 F.2d 248 (6th Cir.), *cert. denied,* ___ U.S. ___, 109 S.Ct. 307 (1988). This decision reversed the mail fraud convictions of a defendant who submitted false information to the state of Tennessee in applications by nonprofit organizations for licenses to conduct bingo games for charitable purposes. *Id.* at 249. The indictment described the scheme and artifice as one "to defraud the State of Tennessee of the right to issue certificates of registration to charitable organizations to conduct bingo games, based on complete, true and accurate information to be provided by those applying for said

permits." *Id.* at 251.[7] The legal issue was whether the activity described in the indictment charged a mail fraud violation. Having found no deprivation of a property interest belonging to the State of Tennessee, the Sixth Circuit resolved the issue as follows:

> In our view, the certificate of registration or the bingo license may well be "property" once issued insofar as the charitable organization is concerned, but certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee. In sum, we find that Tennessee's right to accurate information with respect to its issuance of bingo permits constitutes an intangible right and thus the scheme and artifice as charged in the indictment in support of the eleven counts of mail fraud does not state a crime 18 U.S.C. § 1341 (sic) as narrowed by *McNally.* (Emphasis added.)

Id. at 253-254. The Sixth Circuit held in *Murphy* that the state's right to accurate information is an intangible right outside the scope of the mail fraud statute. The Eleventh Circuit in Botero's case decided on indistinguishable facts that CTR information employed by the federal Government to track currency flows is intangible property within the scope of the mail fraud law.[8] The conflict is clear.

7/ This language is remarkably like the language used to charge Botero with mail fraud, but which actually charged only that he deprived the IRS of knowledge of certain transactions.

8/ The self same Eleventh Circuit decided in *United States v. Gafyczk,* 847 F.2d 685 (11th Cir. 1988) that falsification of Bills of Lading involved in an

II. THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE FIFTH AND SEVENTH CIRCUITS BY HOLDING THAT THE FAILURE TO FILE CURRENCY TRANSACTION REPORTS IS A CRIME UNDER THE MAIL FRAUD STATUTE

A. The Eleventh Circuit Is In Conflict With The Fifth Circuit

In addition to reasoning that CTR information is the U.S. Government's intangible property, the District Court decision affirmed without opinion by the Eleventh Circuit ruled that the counts in Botero's indictment charging him with the failure to file CTRs with the IRS were legally sufficient to state an offense under the federal mail fraud statute.

In *United States v. Herron,* 825 F.2d 50 (5th Cir. 1987), the Fifth Circuit addressed the question of whether a wire fraud violation exists where the defendants arranged to have currency deposited in a domestic bank without CTRs being filed.[9] *Id.* at 52. The Fifth Circuit reversed the defendants' wire fraud convictions. *Id.* at 59-60. In doing so, it explained that allegations setting forth a scheme to deprive the United

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export transaction did not defraud or deprive the United States Customs Service of a property interest. The decision in Botero's case suggests that the Eleventh Circuit has now singled out the CTR as a type of document which, unlike any other, is either property itself or contains information which is property.

9/ The wire fraud and mail fraud statutes contain the same operative language and are therefore construed in the same way. *See United States v. Herron*, 825 F.2d at 54, n. 5.

States of taxes would have satisfied the property requirement set forth in *McNally*. The indictment in *Herron*, however, like the mail fraud counts in Botero's indictment, did not contain the word "taxes" or allege any other deprivation of property. *Herron*, 825 F.2d at 56. The Fifth Circuit's analysis of the language in the indictment produced unequivocal conclusions:

> While the motivating force behind the defendants' actions was an intent to introduce large sums of money into the domestic banking system without triggering the financial institution's reporting requirement, we believe the deprivation of CTR information from financial institutions fails to satisfy the "money or property" requirement of *McNally*.
>
> ***
>
> Furthermore, the Government had no right of ownership in CTR information potentially generated by [the defendants] commensurate with a company's property interest in its own money.
>
> ***
>
> The Government had no proprietary interest in the CTR information it failed to obtain from [the defendants].
>
> ***

> We refuse to create a new strand in the bundle of property rights which gives the government an ownership interest in information it does not already possess and has not by law compelled an individual to divulge.

Id. at 57-58. These conclusions are in stark conflict with the Eleventh Circuit's judgment that an indictment alleging failure to file CTR information with the IRS is legally sufficient under the mail fraud statute.

B. The Eleventh Circuit Is In Conflict With The Seventh Circuit

United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987), is an early post-*McNally* decision by the Seventh Circuit with which the Eleventh Circuit's decision in this case is in conflict. The indictment in *Gimbel* charged the defendant with mail fraud and wire fraud by alleging a scheme consisting of depriving the Treasury Department of CTRs and other accurate information and data to be used to determine the correct source and amount of income in the determination and assessment of income taxes. *Id.* at 623, 626. The *Gimbel* court ruled that such an indictment failed to state an offense, because it did not charge that the scheme deprived the Treasury Department of money or property. *Id.* at 626.

This District Court opinion affirmed by the Eleventh Circuit dismissed the significance of Petitioner Botero's reliance on *Gimbel* in his motion for relief under 28 U.S.C. § 2255 by arguing that this Court's subsequent ruling in *Carpenter,* overruled *Gimbel.* That argument is incorrect. *Carpenter* does not affect the validity of the holding in

Gimbel. As discussed previously, *Carpenter* clarified the concept that the mail fraud statute protects all property rights, whether tangible or intangible. The issue in *Gimbel*, as recited in the quote below, was simpler: whether by being deprived of CTR information, the Treasury was deprived of property generally:

> In this case, as in *McNally*, the defendant is accused of not providing information to government officials 'whose actions could have been affected by the disclosure.' *Id.* at ____, n. 9, 107 S.Ct. at 2882 n. 9. The only possible distinction is that the indictment in this case is based on the deprivation of information to Treasury Department officials whose primary function is to collect revenue, while the indictment in *McNally* did not refer to a government agency specifically involved in financial matters. However, this distinction is not significant .... The relevant fact in both cases is that the jury was not required to find that the scheme resulted in the government being deprived of money or property.

United States v. Gimbel, 830 F.2d at 627. As is evident from the Assistant U.S. Attorney's remarks about mail fraud in her opening statement at trial, the jury in Botero's case was not required to find that the Government was deprived of money or property.[10]

The Seventh Circuit's rule, consequently, is that a charge of failure to file CTRs is insufficient under the mail

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10/ These remarks are quoted at pages 5 and 6 of this Petition.

fraud statute, because CTRs are not government property, tangible or intangible. The Eleventh Circuit's decision is in conflict with this rule.

The United States District Court for the Northern District of Illinois confirmed this Seventh Circuit rule in *United States v. Riky,* 669 F.Supp. 196 (N.D. Ill. 1987), *cert. denied,* 110 S.Ct. 585 (1989). The indictment in *Riky* charged the defendant with wire fraud through depriving the Department of Treasury of CTR information. The District Court dismissed the wire fraud counts:

> In this case, the alleged deprivation is also informational. It cannot seriously be contended that the CTRs or income information are property belonging to the Government; instead, they are important only insofar as they alert the government to items in which they may have a property interest. While the indictment suggests that the defendants' schemes may have deprived the government of tax revenues, it does not allege any facts from which this court could conclude that that was in fact the case.

Id. at 198-199. The Eleventh Circuit is in direct conflict with the foregoing articulation of the Seventh Circuit's rule, because the indictment in Botero's case contains no allegation that the United States was deprived of tax revenues.

III. THE ELEVENTH CIRCUIT'S DECISION MAKES INFORMATION ON ALL U.S. GOVERNMENT FORMS U.S. GOVERNMENT PROPERTY, AN IMPERMISSIBLE RESULT

If the Eleventh Circuit's decision is allowed to stand, the mail fraud criteria set down by this Court in *McNally* will be severely eroded. Billions of items of information intended solely for regulatory purposes, would be considered U.S. Government property. Failure to file such information would justify an indictment and conviction for mail fraud, a result not contemplated by this Court in *McNally*. Furthermore, the Eleventh Circuit's decision offers protection to vaguely worded indictments which only infer the possibility of crimes, however remote, without actually making allegations sufficient to state an offense. Individuals will be uncertain about cooperating in the submission of forms and questionnaires. This decision should be reversed to resolve the Eleventh Circuit's conflict with the better view of this Court and of other Circuits.

CONCLUSION

For the above stated reasons, Hernan Botero-Moreno respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on both questions presented.

Respectfully submitted,

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Dated: February 9, 1990

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5053

D.C. Docket No. 81-6018-CR-EPS

DO NOT PUBLISH

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

HERNAN BOTERO MORENO,

Defendant-Appellant.

No. 88-5953

D.C. Docket No. 87-6750-CIV-EPS

HERNAN BOTERO MORENO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(November 15, 1989)

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM AFFIRMED. See 11th Cir. Rule 36-1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6750-CIV-SPELLMAN

HERNAN BOTERO MORENO,
Movant,

-vs-

BILL R. STORY, SUPERINTENDENT,
FCI, ASHLAND, KENTUCKY,
Respondent.
_____/

MEMORANDUM OPINION
ORDER DENYING MOTION FOR RELIEF UNDER 28 U.S.C. 2255

THIS CAUSE comes before the Court upon Movant's Motion for Relief Under 28 U.S.C. 2255. Upon careful review of the record, this Court finds that this Motion must be DENIED on grounds which are discussed more fully below.

The Movant argues that a recent Supreme Court case, *McNally v. United States*, 483 U.S. _____, 107 S.Ct. 2875 (1987), requires that his sentence be vacated. *McNally* was decided after Movant's sentence was imposed and after his direct appeal of that sentence. Movant argues that *McNally* holds that a conviction for mail fraud requires an allegation and corresponding proof of the loss of a

tangible property right. Specifically, Movant argues that *McNally* has been used to vacate convictions dealing with CTR reporting requirements (as were at issue in this case). *United States v. Corono*, No. 83-854-CR (S.D. Fla. September 17, 1987); *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987); *United States v. Gimbel*, 632 F.Supp. 748 (E.D. Wisc. 1985).

The first question this Court must resolve is whether *McNally* should be applied retroactively in collateral attacks. The Movant argues that *McNally* should be applied retroactively, and cites *Inger v. Enzor*, 664 F.Supp. 814 (S.D.N.Y. 1987) as support. *McNally* establishes the elements of the crime for which Movant was convicted -- mail fraud. If the elements of that crime have not been met, then the conviction must be vacated. No crime has been committed, and the Movant cannot therefore be incarcerated. Therefore, *McNally* must be applied retroactively to any case, whether on direct appeal or collateral attack, in which it is appropriate; however, the question remains in this case whether *McNally* applies at all.

The Movant asserts that *McNally* applies because it holds that a tangible property loss must be both alleged and proved in a conviction for mail fraud. The Government argues that *McNally* was specifically limited in *Carpenter v. United States*, _____ U.S. _____, 108 S.Ct. 316 (1987). The Supreme Court in that case clarified its position in *McNally* and held that *McNally* did not draw a distinction between tangible and intangible property.

In this case, there was intanbible property at stake -- the information which the Internal Revenue Service was deprived of (i.e., information contained within the CTR form and collected for "use of criminal, tax and regulatory

investigations and proceedings"). This is consistent with the reasoning used in *Carpenter.*

The Movant cites a decision in direct conflict with this result. *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1986). This decision, however, was decided prior to the Supreme Court's decision in *Carpenter.* Accordingly, *Gimbel* is predicated on a misconception of *McNally* which was clarified in *Carpenter.* This is supported by other cases which have confined *McNally* to its facts. *United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987); *United States v. Wellman*, 930 F.2d 1469 (7th Cir. 1987); *United States v. Runnels*, 842 F.2d 909 (6th Cir. 1987). Therefore, even though *McNally* does apply retroactively in collateral attacks, an intangible property loss is sufficient to support the "deprivation of property or money" requirement in mail fraud cases. Here, such loss was both alleged and proven.

Additionally, in subsequent motions the Movant has, without any support, argued that: 1) this Court's sentence was in error because there was an extreme discrepancy between the Movant's sentence and that of other defendants; 2) this Court was influenced by out-of-court statements that the funds were "drug-related;" 3) the Court did not consider the Movant's age, medical condition or lack of prior convictions; 4) the Court relied on determinations reached in a co-defendant's trial that the Movant was a "principle" in the criminal scheme; 5) the PSI contained improper inferences that the funds were proceeds of drug trafficking; and 6) this Court should have given the Parole Commission discretion to release him on parole whenever the Parole Commission deems appropriate, instead of denying parole eligibility until after ten years imprisonment has been served. These arguments lack any support in law or fact and are therefore rejected by this Court.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that this Motion fo Relief Under 28 U.S.C. 2255 is DENIED. Additionally, this Court finds Movant's Motion for Hearing to be unnecessary and that Motion is also DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 16 day of September, 1988.

/s/ EUGENE E. SPELLMAN

UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No: 81-6018-cr-ALH (s)

UNITED STATES OF AMERICA	)	
	)	
V.	)	Title 18, US Code, Sec. 371
	)	M/S - 5 years and $10,000
HERNAN BOTERO	)	Title 18, US Code,
ROBERTO BOTERO	)	Sec. 1001
LOSARDO RESTREPO, aka "LEE"	)	M/S - 5 years and $10,000
DOLORES EIRIN, aka "LOLITA"	)	Title 18, US Code, Sec. 1341
JOHN DOE, aka "WILLIS"	)	M/S - 5 years and $1,000
RICHARD ROE, aka "DUKE"	)	Title 31, US Code,
PETER POE, aka "OMAR"	)	Sec. 1081 & 1059
ALBERTO CANO	)	M/S - 5 years and $500,000
GERARDO MARRERO	)	Title 21, US Code, Sec. 952
JAIME BUSTAMANTE	)	M/S - 15 years and $25,000
ALBERTO MERI	)	Title 18, US Code, Sec. 2
_____	)	

SUPERCEDING
INDICTMENT

The GRAND JURY charges that:

_____

COUNT I

Between on or about October 1979, and on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, together with others both known and unknown to the Grand Jury, did unlawfully, willfully, knowingly, and intentionally conspire, combine, confederate and agree together and with each other to do the following:

(1) To unlawfully, knowingly, and intentionally defraud the United States, in particular the Internal Revenue Service, by impairing, obstructing, and defeating its lawful government functions of the collection of data and reports of currency transactions in excess of $10,000.00, for use in criminal, tax, and regulatory investigations and proceedings, and of the enforcement of those laws and regulations found in Title 31 of the United States Code and Title 31 of the Code of Federal Regulations concerning the

required reporting of currency transactions in excess of $10,000.00.

(2) To unlawfully, knowing, and intentionally falsify, conceal and cover-up, and cause to do so, by scheme and device, material facts in a matter within the jurisdiction of an agency or department of the United States, that is the Internal Revenue Service, in violation of Title 18, United States Code, Section 1001.

(3) To unlawfully, knowingly and intentionally place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, after having devised that scheme and artifice to defraud the United States, in particular the Internal Revenue Service, in violation of Title 18, United States Code, Section 1341.

(4) To unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00, in United States currency between December 1979 and October 1980, in violation of Title 31, United States Code, Section 1081 and 1059.

The manner and means by which the said conspiracy was sought to be accomplished consisted of the following:

(A) That five bank accounts would be opened by HERNAN BOTERO and DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(B) That large amounts of United States currency, well in excess of $10,000.00, for each deposit, would be deposited in these accounts between December 1979 an October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the five accounts would at first be distributed by Alan Campbell and Gary

Dodson by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's checks and the mailing of the cashier's checks to various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States Government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00, was to be "laundered" through the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thereafter withdrawn from the Landmark First National Bank in such a way as to illegally prevent the United States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of the currency from the United States as described in (G) above.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objectives thereof, the following overt acts among others were committed within the Southern District of Florida:

(1) In or about December 1979, HERNAN BOTERO met with DOLORES EIRIN, Alan Campbell, and Gary Dodson, and discussed the depositing of United States currency at the Landmark First National Bank without the filing of IRS Form 4789.

(2) From on or about December 31, 1979 until on or about October 1980, HERNAN BOTERO, ROBERTO BOTERO, LOSARDO RESTREPO, JOHN DOE, RICHARD ROE, PETER POE, ALBERTO CANO, GERARDO MARRERO, JAIME BUSTAMANTE and ALBERT MERI brought amounts of United States currency of approximately $55,000,000.00 to DOLORES EIRIN, Alan Campbell, and Gary Dodson to be deposited to five accounts used by the defendants at the Landmark First National Bank.

(3) From on or about January 1980 until on or about October 1980, Alan Campbell and Gary Dodson, according to directions of HERNAN and ROBERTO BOTERO that the United States Government not know of the deposits made at the Landmark First National Bank described in paragraph (2) above, prepared IRS Forms 4789 using false names, supplied by HERNAN BOTERO, destroyed the original form, and placed a copy in the files at the Landmark First National Bank.

(4) From on or about January 1980 until on or about February 1980, HERNAN BOTERO, DOLORES EIRIN, Gary Dodson and Alan Campbell caused United States currency to be wired from the accounts owned and used by the defendants herein at the Landmark First

National Bank to accounts of other persons at various banks, according to the directions of HERNAN BOTERO.

(5) From on or about February 1980 until on or about October 1980, HERNAN BOTERO, ROBERTO BOTERO, DOLORES EIRIN, Gary Dodson and Alan Campbell caused United States currency to be withdrawn from the accounts owned and used by the defendants herein at the Landmark First National Bank, converted this amount to cashier's checks, and mailed said checks from the United States Post Office in Plantation, Florida to various individuals, according to directions of HERNAN BOTERO and ROBERTO BOTERO.

In violation of Title 18, United States Code, Section 371; Section 2.

COUNT II

Between on or about October 1979 and on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly, and intentionally falsify, conceal and cover-up and cause to do so, by scheme and device, material facts within the jurisdiction of an agency or department of the United States, that is the IRS which scheme and device included the following:

(A) That five bank accounts would be opened by HERNAN BOTERO and DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(B) That large amounts of United States currency, well in excess of $10,000.00, for each deposit, would be deposited in these accounts between December 1979 an October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the five accounts would at first be distributed by Alan Campbell and Gary Dodson by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's checks and the mailing of the cashier's checks to various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN BOTERO and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States Government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00, was to be "laundered" through the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thereafter withdrawn from the Landmark First National Bank in such a way as to illegally prevent the United States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of

the currency from the United States as described in (G) above.

In truth and in fact, as the defendants herein well then knew: the said five bank accounts opened at Landmark First National Bank were owned, used and held by HERNAN BOTERO; the deposits to these said accounts were being made or caused to be made by the defendants herein; the IRS Forms 4789 were not being filed with the Internal Revenue Service as required by law because of the defendants' aforementioned scheme and device and despite the defendants' knowledge of the requirements for proper filing with the Internal Revenue Service of all cash transactions at the Landmark First National Bank that were in excess of $10,000.00.

In violation of Title 18, United States Code, Section 1001; Section 2.

COUNT III

During on or about June 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO

JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

(A) That five bank accounts would be opened by HERNAN BOTERO and DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(B) That large amounts of United States currency, well in excess of $10,000.00, for each deposit, would be deposited in these accounts between December 1979 an October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the five accounts would at first be distributed by Alan Campbell and Gary Dodson by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's checks and the mailing of the cashier's checks to various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States Government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00, was to be "laundered" through

the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thereafter withdrawn from the Landmark First National Bank in such a way as to illegally prevent the United States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of the currency from the United States as described in (G) above.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT IV

During on or about July 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by

mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT V

During on or about August 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did

place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT VI

During on or about September 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE

ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT VII

During on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"

PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT VIII

During on or about January 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO

LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT IX

During on or about February 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO

LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT X

During on or about March 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XI

During on or about April 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XII

During on or about May 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XIII

During on or about June 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XIV

During on or about July 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XV

During on or about August 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XVI

During on or about September 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO

ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XVII

During on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO

LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) with the Internal Revenue Service in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank of Broward County, Florida, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00 in United States currency between December 1979 and October 1980.

In violation of Title 31, United States Code, Section 1081 and 1059; Title 18, United States Code, Section 2.

COUNT XVIII

Between, on or about December 1979 and on or about October 1980, at Plantation, Broward County, within the Southern District of Florida, and elsewhere,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO, aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, together with others both known and unknown to the Grand Jury, did unlawfully, knowingly, intentionally, and willfully, import into the United States from a place outside the United States, that is, Colombia (South America) a schedule II controlled substance, that is, cocaine, in an unknown amount.

In violation of Title 21, United States Code, Sec. 952(a); Title 18, United States Code, Sec. 2.

A TRUE BILL

_____
Foreperson

_____
Atlee W. Wampler, III
United States Attorney

_____
G. Roger Markley, Special Attorney
United States Department of Justice

PERTINENT STATUTES AND RULES

18 U.S.C. § 1341 Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything presented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

31 C.F.R. § 103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings.

31 C.F.R. § 103.22(a)(1) Reports of Currency Transactions.

Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000....

ELEVENTH CIRCUIT RULE 36-1 (11th Cir.R. 36-1)
Affirmance Without Opinion

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

(2)

No. 89-1281

In the Supreme Court of the United States

OCTOBER TERM, 1989

HERNAN BOTERO MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether petitioner's mail fraud convictions should be vacated on collateral attack in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1281

HERNAN BOTERO MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 891 F.2d 905 (Table). The opinion of the district court (Pet. App. A2-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1989. The petition for a writ of certiorari was filed on February 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18

U.S.C. 371; one count of falsifying material facts within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001; and five counts of mail fraud, in violation of 18 U.S.C. 1341. His conviction was upheld on direct appeal. *United States* v. *Botero*, 808 F.2d 59 (11th Cir. 1986) (Table), cert. denied, 483 U.S. 1020 (1987). In 1987, this Court held in *McNally* v. *United States*, 483 U.S. 350, that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Pursuant to 28 U.S.C. 2255, petitioner then moved to vacate his mail fraud convictions in the United States District Court for the Southern District of Florida. The district court denied the motion. Pet. App. A2-A5. The court of appeals affirmed. *Id.* at A1.

1. The evidence at petitioner's trial is detailed in the government's brief filed in the court of appeals. Gov't C.A. Br. 6-19. Briefly, co-conspirator Dolores Eirin was an officer of the Landmark First National Bank of Fort Lauderdale, Florida. In October 1979, petitioner advised Eirin that he wished to make large deposits of cash at the bank without the bank's filing the required Currency Transaction Reports (CTRs) with the Internal Revenue Service. Eirin recruited co-conspirators Alan Campbell and Gary Dodson, both officers at the bank, to participate in the money laundering operation.

Petitioner subsequently met with Campbell and Dodson and explained that there was a "product" originating in Colombia that he imported to the United States and sold for cash. Petitioner stated that he wanted the bank to convert the cash proceeds from his sale of the "product" into Colombian pesos and to transfer it to Colombian banks without reporting the transactions to governmental authorities. Petitioner advised Campbell and Dodson that they could expect to handle about $400,000 in cash each banking day,

and he promised them and Eirin 3/4 of one percent of the funds that they handled.

To facilitate the scheme, petitioner opened five accounts at the bank in the names of fictitious customers. During 1980, petitioner, working through a number of confederates, laundered more than $55 million through those five accounts. The pattern of operation throughout the period remained much the same. Couriers would regularly arrive at the bank with large amounts of cash for deposit. After each deposit, Campbell, Dodson, or Eirin would prepare a CTR for the files (in order to mislead the bank) and would thereafter destroy the original copy instead of sending it to the Internal Revenue Service. They would then transfer the cash deposits to other banks by means of wire transfers or cashier's checks.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Subsequently, in *Carpenter* v. *United States*, 484 U.S. 19 (1987), this Court made clear that the property protected by the mail fraud statute includes intangible, as well as tangible, property, and upheld the wire fraud conviction of the writer of a column for the Wall Street Journal who traded on his knowledge of what the column would say. Thereafter, petitioner moved to vacate his mail fraud convictions on the ground that they had been based on a scheme to conceal information from the Internal Revenue Service, which, he contended, was not a property interest within the meaning of *McNally* and *Carpenter*.

The district court denied relief. Pet. App. A2-A5. The court found that "the information which the Internal Revenue Service was deprived of (i.e., information con-

tained within the CTR form and collected for 'use [in] criminal, tax and regulatory investigations and proceedings')" was property under *Carpenter*. *Id.* at A3-A4. Since "an intangible property loss is sufficient to support the 'deprivation of property or money' requirement in mail fraud cases," the court declined to vacate petitioner's mail fraud convictions because "such loss was both alleged and proven." *Id.* at A4.

3. The court of appeals affirmed without issuing an opinion. Pet. App. A1.

ARGUMENT

As an initial matter, petitioner ignores the fact that the standard of review on collateral attack under 28 U.S.C. 2255 is more stringent than the standard that applies when a defendant challenges his conviction on direct appeal. This Court made clear in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), that a change in the substantive law such as the change made by *McNally* warrants collateral relief only if, as a result of the change in the law, a defendant's conviction could be said to be a "miscarriage of justice." Consequently, petitioner is entitled to collateral relief from his mail fraud convictions only if he showed "that under no possible view of his conduct was he guilty of a federal crime." *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); see also *Bateman* v. *United States*, 875 F.2d 1304, 1306-1307 (7th Cir. 1989).

1. Petitioner's contention (Pet. 7-10, 13-14) that the decisions of the courts below are inconsistent with this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), is without merit. The defendants in *McNally* were charged with and convicted of mail fraud on the theory that they had engaged in a scheme to deprive the citizens of Kentucky

of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights," this Court reversed. *McNally*, 483 U.S. at 360. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *Ibid.* All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter*, was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Carpenter*, 484 U.S. at 25.[1]

In *Carpenter*, this Court made clear that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." 484 U.S. at 25. Holding that a scheme to trade on an employer's confidential business information was within the reach of the mail and wire fraud statutes, the Court reiterated that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at 27.

In this case, petitioner's mail fraud convictions are not based on a scheme to deprive his employer of the intangible right to his honest and faithful service. Rather, petitioner's convictions are based on a money laundering scheme to evade the CTR reporting requirements. Petitioner's con-

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[1] Congress recently amended the federal fraud statutes to provide that "a 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

tention that his convictions are invalid under *McNally* and *Carpenter* rests on the claim (Pet. 8-14) that the Internal Revenue Service had no property interest in the information about financial transactions provided in CTRs. That claim, however, overlooks the fact that "[t]he entire purpose of the CTR filing is to leave a 'paper trail' so the IRS will be able to ascertain if taxes have been paid on large sums of money which move in interstate commerce, whether legally or illegally." *United States* v. *Herron*, 825 F.2d 50, 56 (5th Cir. 1987). Just as the confidential business information in *Carpenter* was of economic value to the Wall Street Journal, the information provided in the CTR has specific and concrete economic value to the Internal Revenue Service for the purpose of assessing and collecting taxes. The IRS's economic interest in the information in CTRs for that purpose constitutes a "property interest" at least as readily cognizable as the interest at issue in *Carpenter*.[2]

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[2] Petitioner argues (Pet. 13-14) that the information in CTRs cannot be considered a "property interest" under *Carpenter* because it does not have all of the attributes of confidential business information referred to by the Court in *Carpenter*. The discussion upon which petitioner relies, however, merely described the confidential information in that case. See *Carpenter*, 484 U.S. at 26-27. That discussion in *Carpenter* does not require that all information having economic value to the victim be of the same nature to be considered a "property interest." See *United States* v. *Grossman*, 843 F.2d 78, 86 (2d Cir. 1988), cert. denied, 109 S. Ct. 864 (1989).

Petitioner also contends (Pet. 10-13) that the decisions of the courts below conflict with this Court's discussion of the CTR recordkeeping and reporting requirements in *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974), because "[n]owhere in the discussion by this Court is there any basis for an inference that the information itself constitutes property belonging to the United States." There is no merit to that contention. In that case, the Court rejected a variety of constitutional attacks on the CTR recordkeeping and reporting requirements. Since that case was decided 13 years before *McNally*, the Court had no occasion

Even if the IRS has no cognizable property interest in the *information* provided in CTRs, viewed in the abstract, petitioner's money laundering scheme plainly deprived the IRS of the taxes due on his income from the sale of his "product" in the United States. While the indictment did not specifically allege that petitioner deprived the IRS of taxes due, the indictment, read as a whole, charges that petitioner engaged in a scheme to defraud the IRS of taxes through the concealment of more than $55 million, with the failure to file CTRs being merely one of the means through which the income was concealed. Significantly, the jury instructions required the jury to find that the purpose of the scheme was to defraud the victim of money or property.[3] Accordingly, since petitioner's money laundering scheme plainly deprived the IRS of taxes due and since the jury necessarily found that an overall object of the scheme was the evasion of taxes, *McNally* does not require that petitioner's mail fraud convictions be overturned on collateral attack. Cf. *United States* v. *Bucey*, 876 F.2d 1297, 1309-1310 (7th Cir.) (upholding, on direct appeal, a mail fraud conviction based on a scheme to defraud the government of income taxes), cert. denied, 110 S. Ct. 565 (1989); *United States* v. *Porcelli*, 865 F.2d 1352 (2d Cir.) (upholding, on direct appeal, a mail fraud conviction based on a scheme to defraud a state government of sales taxes), cert. denied, 110 S. Ct. 53 (1989).

2. Nor is there merit to petitioner's contention (Pet. 20-24) that review is warranted because the decision of the

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to consider whether the IRS had a "property interest" in the information reported in CTRs for purposes of the mail and wire fraud statutes.

[3] The district court instructed the jury that "[t]he words 'scheme' or 'artifice' to defraud include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived." Gov't C.A. Br. 42.

court below conflicts with *United States* v. *Herron*, 825 F.2d 50 (5th Cir. 1987), and *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987). To be sure, in those cases the Fifth and Seventh Circuits both concluded after *McNally* that a scheme to avoid filing CTRs was a scheme to defraud the the government of "intangible rights" in data rather than a scheme to deprive the government of money or property. Since both *Herron* and *Gimbel* were decided before *Carpenter*, however, neither the Fifth nor the Seventh Circuit considered whether the economic value of CTR information to the IRS for the purpose of assessing and collecting taxes gives rise to a property interest like that of the Wall Street Journal in its confidential business information. Moreover, both *Herron* and *Gimbel* were decided on direct appeal rather than on collateral attack. Furthermore, unlike in this case, the jury instructions in *Herron* and *Gimbel* did not require the juries to find that the government had been deprived of money or property. *Herron*, 825 F.2d at 58 ("[i]t is also important to note that the jury instructions in this case did not require the jury to find that the United States had been defrauded of money or property by the defendants"); *Gimbel*, 830 F.2d at 627 ("[t]he relevant fact in both [*McNally* and this case] is that the jury was not required to find that the scheme resulted in the government being deprived of money or property").[4]

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[4] Nor is review warranted on account of a conflict with any of the other cases petitioner cites. See Pet. 14-19. The decision in *United States* v. *Grossman*, *supra*, supports the decision below. In that case, the Second Circuit *upheld* the mail fraud conviction of a law firm associate who directed a stock options trading scheme using confidential information entrusted to the law firm by one of its clients. The Second Circuit concluded that the law firm had a property interest in the confidential information because maintaining the confidentiality of the information directly affected the law firm's economic interest in protecting its business reputation and its ability to attract clients. 843 F.2d at 85-86.

The issue whether a money laundering scheme to evade the CTR reporting requirements involves a scheme to deprive the IRS of "money or property" under the mail fraud statute is not likely to have any continuing importance. After petitioner was convicted, Congress enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. That Act, which totally revised prior law, specifically imposes criminal liability for causing a financial institution to fail to file a CTR, as well as for structuring deposits for the purpose of evading the reporting re-

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The critical fact in both *Carpenter* and *Grossman*, as in this case, was not that the information was confidential but rather that the information had economic value to the victims of the schemes. In *United States* v. *Porcelli*, *supra*, the Second Circuit also *upheld* a mail fraud conviction; the scheme in that case had as its object the avoidance of state sales taxes.

In *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), the court reversed the defendants' convictions for violating the National Stolen Property Act by bringing pre-Columbian artifacts from Mexico to the United States without the permission of the Mexican government. In the passage relied upon by petitioner (Pet. 17-18), the court merely explained that the artifacts were not "stolen" within the meaning of the Act because the Mexican government at that time was merely regulating the export of the artifacts but had not yet declared its ownership of them. 545 F.2d at 1000-1003. The meaning of the mail fraud statute was not at issue.

In *United States* v. *Murphy*, 836 F.2d 248 (6th Cir.), cert. denied, 109 S. Ct. 307 (1988), the court reversed a mail fraud conviction based on a scheme to submit false information to the State in order to obtain a bingo license. While the court in *Murphy* held that the State's right to accurate information was an "intangible right" outside the scope of the mail fraud statute, there was no indication in that case that the information had any economic value to the State. In this case, in contrast, the CTRs had economic value to the IRS because they served to uncover information that would be useful in collecting taxes.

quirements of 31 U.S.C. 5313.[5] Since the new statute provides a direct means of prosecuting money laundering offenses, it will no longer be necessary to prosecute money launderers indirectly under other statutes. Thus, the issue whether a money laundering scheme comes within the reach of the mail fraud statute is largely "made academic by the new law." *United States* v. *Herron*, 825 F.2d at 56.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

APRIL 1990

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[5] 31 U.S.C. 5324 (Supp. V 1987) now provides:

> No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to such transaction –
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

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No. 89-1281

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

HERNAN BOTERO MORENO,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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SUMMARY

The decision of the Eleventh Circuit in this case is based on a legal theory which will have a serious impact wherever U.S. Government forms and questionnaires are involved. The lower court stated in this case that items of information on Government forms constitute property belonging to the United States Government, supplying the necessary U.S. Government property interest to sustain conviction under the mail fraud statute. The Government in its Opposition impermissibly broadened that vague theory of Government property to any potential property interest of the Government such as recovery of taxes accruing from broad regulatory objectives recited in states and regulations. There are scores of statutes and regulations which require forms and questionnaires. Adoption of a new legal theory that the United States has a cognizable property interest in bare data, such as names and addresses on forms, is an unwise expansion of the law with respect to Government property.

Rather than confronting Petitioner's legal issue the Government's Opposition selects partial facts from the record to convince the Court that this case is routine and involves drugs. The Government's argument assumes that legitimate currency exchange businesses are automatically engaged in "money laundering." Petitioner was convicted of mail fraud on the baseless assumption that a currency exchange business must necessarily involve "money laundering." The economic realities in Latin America which

encourage local governments to sanction private conversion of hard currency to local soft currency have been deftly ignored. The prime significance of this case is that a new class of U.S. Government property interests was created by the Court in billions of items of data on Government forms to justify conviction under the mail fraud statute.

I. PETITIONER USED THE CORRECT STANDARD OF REVIEW.

The maverick theory of the Eleventh Circuit concerning the Government's property interest in data on Currency Transaction Reports ("CTRs") is different from every other circuit which has considered the issue. Petitioner was imprisoned for 30 years for mail fraud on the basis of that incorrect reasoning. This contradiction among circuits points to a "miscarriage of justice." The record also shows the use of a false affidavit by the Chief Assistant U.S. Attorney to create the impression without objective evidence that this case involved drugs. Imprisonment for 30 years at the Petitioner's advanced age and physical condition is under the circumstances sufficient to support a collateral attack on the conviction. This case meets the standard referred to in *Davis v. United States,* 417 U.S. 333 (1974).

II. THE ELEVENTH CIRCUIT DECISION CONTRADICTS THIS COURT AND OTHER CIRCUITS.

The Opposition confuses the legal issue by dwelling upon the cases which distinguish tangible and intangible property rights. Petitioner does not rely on that

distinction. The alleged deprivation of the items of data on CTRs cannot possibly qualify as an intangible Government property right of the rank sufficient to justify conviction under the mail fraud statute. Petitioner asserts that the information on CTRs is not property of the United States Government nor an intangible property right sufficient to justify the elements of the mail fraud statute.[1]

III. THE "MONEY LAUNDERING" COMMENTS IN THE OPPOSITION ARE UNFAIR AND MISLEADING.

Contrary to the innuendoes in the Opposition, Petitioner was convicted and imprisoned for mail fraud not for "money laundering." There is no credible evidence that

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1/ The Petitioner's position is not inconsistent with *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). In *McNally* the Court held that a scheme to defraud a state's citizens of their intangible rights to honest and impartial government service did not constitute a mail fraud under the statute. *McNally*, 483 U.S. at 360. The Court pointed to legislative history requiring the deprivation of property as classically defined and recognized. In *Carpenter*, the court found that a reporter violated the mail and wire fraud statute when he appropriated his newspaper's confidential information for personal gain. However, the intangible property right protected under *Carpenter* was the long established property right which a newspaper holds in the confidential information which it produces in the regular course of business. No such property right has ever been granted to the Government, by Congress or the Courts, on the data provided by citizens on Government forms. Courts construing *Carpenter* and *McNally* have specifically refrained from inventing new Government property rights to trigger protection under the mail fraud statute. *See e.g., United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) and *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) (failure to file CTRs does not violate a Government property right under the mail fraud statute).

he was engaged in "money laundering." This case is another of those sad instances in which the Government relies solely on the purchased testimony of individuals who are themselves self-confessed felons in order to obtain hearsay about a third individual. The Government has consistently refused to analyze currency exchange businesses which are legitimate government licensed operations throughout Latin America. Petitioner was an agent of a currency exchange business which exchanged U.S. Dollars retained in the United States for pesos in Colombia. There is no "money laundering" scheme on record which involves the illogical process of transferring hard currency into inflationary soft currency, the latter useless in the future to its holders without reconversion into hard currency. The conspiracy theory in this case was strained to the outer limits.

IV. PETITIONER WAS NOT INDICTED OR CONVICTED FOR INCOME TAX FRAUD.

In order to avoid the consequences of the lower court's incorrect conclusion that data on Government forms is Government property, a new theory never advanced at trial was set forth in the Opposition. That theory was that Petitioner was indicted and convicted for income tax fraud. The record shows that Petitioner was an agent of the currency exchange business and, consequently, can be indicted and convicted of tax fraud only if he received some economic benefit from the money which was deposited by the currency exchange business. *Helvering v. Horst*, 311 U.S. 112 (1940). There was no allegation in the indictment nor proof at trial that Petitioner received any of the money in the currency exchange. The new theory that the indictment was

for the purpose for protecting the U.S. Government from tax fraud is a late and erroneous argument. The indictment in fact alleged that Petitioner transferred the money to others which directly contradicts the possibility of personal income tax evasion. Neither the property theory of the Court nor the lately advanced theory of the Opposition on income tax fraud can sustain the mail fraud conviction.

Both *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) and *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) support Petitioner. The decision in *Carpenter*, *supra*, does not invalidate the conclusion of *Herron* and *Gimbel* that failure to file CTRs is not a crime under the mail fraud statute. *Carpenter* dealt with the long recognized property right which a newspaper holds in the proprietary information it creates. *Carpenter,* 484 U.S. 19. *Herron* and *Gimbel* did not involve such a clearly recognized property right.[2] Only if the CTR information has intrinsic economic value as claimed by the Government in this case can *Herron* and *Gimbel* be inapposite. The quotation on page 6 of the Opposition from *Herron* is misleading. While the *Herron* Court acknowledged that the purpose of CTR filings was to leave a "paper trail"

2/ In *Gimbel* the Seventh Circuit held that defendants who deprived the Treasury Department of CTRs and other data useful in an assessment of income taxes, had not deprived the Government of money or of any recognized property interest, and had therefore not violated the federal mail fraud statute. *Gimbel*, 830 F.2d at 626. Similarly, the Fifth Circuit in *Herron* found that defendants who failed to file CTRs when depositing currency in domestic banks had not violated the mail fraud statute because "the Government had no right of ownership in CTR information." *Herron*, 825 F.2d at 56. The *Herron* court properly "refuse[d] to create a new strand in the bundle of property rights which gives the Government an ownership interest in information it does not already possess." *Herron*, 825 F.2d at 57-58.

for future tax determinations by the IRS, the Court held that the property requirement of the mail fraud statute is not satisfied unless a deliberate scheme to deprive the United States Government of taxes is alleged and proven. *Herron*, 825 F.2d at 56. Absent such an allegation in the *Herron* indictment, the Fifth Circuit refused to find a Government property interest in the CTR information sufficient to trigger a mail fraud violation. *Id.* at 57-58. The Botero indictment, similarly, failed to allege any tax evasion scheme, and should properly have resulted in a similar outcome.

V. THE STATUTES CITED ARE IRRELEVANT TO THE ISSUE RAISED BY THIS PETITION.

Petitioner was not convicted under a "money laundering" statute but for mail fraud. The passage of the statute cited (Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18) by Congress does not nullify the legal issue presented by this case, i.e., whether the data on CTRs and other Government forms is property of the United States Government sufficient to satisfy the mail fraud statute.

The second statute cited in the Opposition, (The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508), which overturned the decision in *McNally, supra*, resurrected the idea that depriving citizens of their right to the honest operation of their Government constitutes mail fraud. But the Government has denied throughout this case that the "fiduciary" theory was part of the case against Petitioner. The United States has insisted

throughout that it prosecuted Petitioner on the basis of the deprivation of property in the form of data not the "fiduciary" theory incorporated in the reporting requirement provisions of 31 U.S.C. 5324 (Supp. V. 1987). Consequently, the statute relied upon by the Opposition does not render moot the issue of whether data on Government forms belongs to the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in order to prevent the widespread use by the Government of a legal theory which can only have pernicious effects upon enforcement of the many statutes and regulations requiring the submission of data on Government forms.

Respectfully submitted,

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